

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of)	
)	
ReconRobotics, Inc.,)	
Request for Waiver of Part 90 of the)	WP Docket No. 08-63
Commission's Rules to Provide for)	
Limited Public Safety and Security)	
Operations at 430-448 MHz)	

**Opposition of ReconRobotics, Inc. to the
Petitions for Reconsideration of
W. Lee McVey and Kristopher Kirby**

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April 14, 2010

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Pursuant to Section 1.106(g) of the Commission's Rules,¹ ReconRobotics, Inc. opposes the Petitions for Reconsideration of W. Lee McVey (filed March 6, 2010) ("McVey Petition") and Kristopher Kirby (filed March 10, 2010) ("Kirby Petition") challenging the grant of a waiver that permits the company's Recon Scout® surveillance device to operate in the 430-448 MHz band.²

A. THIS OPPOSITION IS TIMELY.

Neither Petition complied with the rule requiring service on ReconRobotics.³ ReconRobotics had actual notice on April 8, 2010, in a courtesy email from Mr. McVey. This Opposition is filed within the ten days allowed by the rules, here computed from actual notice.⁴

¹ 47 C.F.R. § 1.106(g).

² *ReconRobotics, Inc., Request for Waiver of Part 90 of the Commission's Rules*, WP Docket No. 08-63, Order, DA 10-291 (Wireless Telecom. Bur. and Public Safety and Homeland Security Bur. released Feb. 23, 2010) (*Waiver Order*).

³ 47 C.F.R. § 1.106(f).

⁴ 47 C.F.R. § 1.106(g).

If the Commission accepts the Petitions, notwithstanding lack of service, then it should also consider the arguments below, and dismiss or deny the Petitions for the reasons given.

B. THE PETITIONS SHOULD BE DISMISSED FOR FAILING TO INTRODUCE NEW MATTER.

A petition for reconsideration either must demonstrate that the challenged order contains a material error or omission, or must raise additional facts not known or existing until after the petitioner's last opportunity to present them.⁵ Neither McVey's nor Kirby's Petition meets these requirements.

Moreover, a petition for reconsideration by a non-party "shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."⁶ Neither Mr. McVey nor Mr. Kirby participated in the proceeding earlier, and neither complies with this requirement.

Mr. McVey states that the *ex parte* rules prevented him from commenting on a study submitted by ReconRobotics, leaving no alternative but to wait and file a Petition for Reconsideration.⁷ This is incorrect. A public notice released on June 6, 2008, initiated a

⁵ *SafeView, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 592 at ¶ 7 (2010), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Like the present matter, *SafeView* was a Commission review of a Bureau-level decision.

⁶ 47 C.F.R. § 1.106(b)(1).

⁷ McVey Petition at 3, referring to ANDREW DRENNER ET AL., EMPIRICAL STUDY OF THE EFFECTS OF 434 MHZ VS. 915 MHZ FREQUENCY BAND ON THE PERFORMANCE OF THE RECON SCOUT, filed with Letter from Mitchell Lazarus to Marlene H. Dortch, Secretary, FCC (filed Nov. 3, 2008).

“permit-but-disclose” proceeding pursuant to Sections 1.1200(a) and 1.1206.⁸ The applicable rules allow *ex parte* presentations after the comment deadline.⁹ Because Mr. McVey has not presented any valid reason for withholding his commentary until now, and offers no newly available evidence or arguments, his Petition should not be considered.

C. PETITIONERS’ SUBSTANTIVE ARGUMENTS DO NOT SUPPORT RECONSIDERATION

Mr. Kirby argues that the waiver is invalid because Part 90 permits only radiolocation devices in the 420-450 MHz band.¹⁰ A waiver allows operation otherwise prohibited by the rules. “The very essence of waiver is the assumed validity of the general rule, *and also the applicant’s violation unless waiver is granted.*”¹¹ The fact that operation of the Recon Scout otherwise violates the rules is the reason for the waiver, not a reason to invalidate the waiver.

Of Mr. McVey’s four substantive points, three parallel issues that ReconRobotics has already addressed in its response to ARRL’s pleading.¹² Mr. McVey accuses ReconRobotics of engaging in unlawful marketing.¹³ We noted earlier that ReconRobotics is responding to an

⁸ *Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Seek Comment on Request for Waiver By ReconRobotics, Inc to Allow Certification and Use of Remote-Controlled Surveillance Robot Operating at 430-448 MHz*, Public Notice, 23 FCC Rcd 7437 (2008). The proceeding was publicized in Amateur radio forums. See, e.g, *ARRL Files Comments in Two Matters Before FCC*, May 29, 2008, <http://www2.arrl.org/news/stories/2008/05/29/10130/>; eHam.net, *ReconRobotics Requests FCC Waiver for Use of 430-448 MHZ*, May 14, 2008, <http://www.eham.net/articles/19305>.

⁹ 47 C.F.R. §§ 1.1200, 1.1206.

¹⁰ Kirby Petition at 1.

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) (emphasis added).

¹² Opposition of ReconRobotics, Inc. to the Petition for Reconsideration of ARRL (filed April 6, 2010) (“Opposition to ARRL”).

¹³ McVey Petition at 4-6.

inquiry from the Enforcement Bureau, and will not litigate the same issues in this docket.¹⁴

Next, Mr. McVey suggests that ReconRobotics' study on building attenuation *versus* frequency should have used different or additional test conditions.¹⁵ ReconRobotics has no quarrel in principle with these suggestions; but its study, like every other, had to limit the combination of conditions being tested.¹⁶ We think the data obtained amply justified the conclusions.¹⁷ And Mr. McVey found discrepancies in the study between received signal strength and a data column titled "Subjective Ratings of Video" in the ReconRobotics study.¹⁸ Subjective ratings often have such discrepancies; and the report provided representative screen shots so that readers can judge the video quality for themselves.¹⁹

Finally, Mr. McVey argues that narrow-width digital transmission would better suit the Recon Scout's operations than analog.²⁰ Both ReconRobotics' original Request for Waiver and

¹⁴ See Opposition to ARRL at 13-14. In any event, Mr. McVey's allegations might at most be grounds for an enforcement action, but not for reconsideration of the waiver. *Id.* at 14.

¹⁵ McVey Petition at 7.

¹⁶ Opposition to ARRL at 9.

¹⁷ Furthermore, a 2008 NIST study that compared propagation at different frequencies through several types of structures showed results consistently trending toward the conclusion drawn by the ReconRobotics study, namely, that building penetration is better at 439-449 MHz than at 902-928 MHz. *Id.* at 8 & n.33 (citing NATIONAL INSTITUTE OF STANDARDS AND COMMERCE, C.L. HOLLOWAY ET AL., ATTENUATION OF RADIO WAVE SIGNALS COUPLED INTO TWELVE LARGE BUILDING STRUCTURES 26, 27 (2008), available at http://www.nist.gov/cgi-bin/get_pdf.cgi?pub_id=32854 (last checked Apr. 12, 2010) (comparing propagation results at 450 MHz (Table 20) with 900 MHz (Table 21))).

¹⁸ McVey Petition at 9.

¹⁹ Opposition to ARRL at 9.

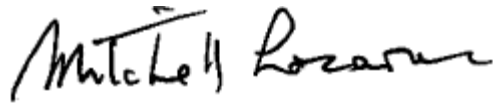
²⁰ McVey Petition at 8.

the Commission's *Waiver Order* addressed this issue.²¹ The factors justifying analog operation have been part of the record since the beginning. Mr. McVey adds nothing new.

CONCLUSION

The record fully supports the Commission's decisions. Nothing in either Petition seriously challenges that outcome.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mitchell Lazarus". The signature is fluid and cursive, with the first name "Mitchell" written in a larger, more prominent script than the last name "Lazarus".

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April 14, 2010

²¹ *Waiver Order* at ¶ 3 n. 8; Request for Waiver of ReconRobotics, Inc. at 7 n.4 (filed Jan. 11, 2008).

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing Opposition of ReconRobotics, Inc. to the Petitions for Reconsideration of W. Lee McVey and Kristopher Kirby has been mailed first class, postage prepaid, this 14th day of April, 2010, to the attached service list (* denotes service by hand delivery):

A handwritten signature in black ink, appearing to read 'D. Lunt', with a stylized flourish extending to the right.

Deborah N. Lunt

SERVICE LIST

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Mr. Kristopher Kirby
**NOT SERVED -- NO ADDRESS
AVAILABLE**